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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6673

ZACKARY C. BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

ON APPEAL FROM THE COUNTY COURT AT LAW
NO. 2, EL PASO COUNTY, TEXAS

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the County Court at Law No. 2 of El Paso County, Texas, on the ground that the questions presented are so insubstantial as not to warrant further argument.

QUESTIONS PRESENTED

Whether Section 38.02(a) of the Texas Penal Code, on its face: (a) violates the first amendment to the United States Constitution because it punishes silence; (b) violates the fifth and fourteenth amendments' due process clauses because it is unconstitutionally vague and overbroad; (c) violates the fourth amendment because it constitutes an unwarranted invasion of the right to privacy; and (d) violates the fifth amendment's self-incrimination clause because it punishes silence.

STATUTE INVOLVED

Section 38.02(a) of the Texas Penal Code is set out in the Jurisdictional Statement at p. 2.

STATEMENT

This is a direct appeal from the final judgment of conviction entered against Appellant on February 1, 1978, in County Court at Law No. 2, El Paso County, Texas.

On December 9, 1977, shortly after noon, Appellant was stopped in an alley by two officers of the El Paso Police Department. One of the officers asked Appellant his name, but Appellant refused to give it, whereupon he was arrested for a violation of Section 38.02 of the Texas Penal Code.

Appellant was tried in Municipal Court No. 3 of the City of El Paso, Texas, found guilty, and assessed a fine of $20.00 plus court costs. He sought and obtained a trial de novo in the county court at law, where he waived trial by jury and pleaded not guilty.

Appellant's Motion to Set Aside Information, presenting essentially the same questions presented on this appeal, was denied by the judge of the county court at law. During the argument on the motion, Appellant's counsel indicated that he assumed the officers "had some reason to make an initial stop and ask a question or so." Transcript of Trial, p. 8.

The County Court at Law adjudged Appellant guilty and assessed him a fine of $45.00 plus court costs. The county court at law being the highest court of the state in which a decision could be had under art. 4.03, Texas Code of Criminal Procedure, an appeal was taken directly to this Court pursuant to 28 U.S.C. Section 1257(2).

ARGUMENT

I.

The Case Should be Dismissed for Failure to Raise A Substantial Federal Question

The insubstantiality of the questions presented on this appeal is apparent when two matters are considered. First, a predicate to prosecution under Section 38.02 is that the

person charged must have been lawfully stopped. Thus, under Terry v. Ohio, 392 U.S. 1 (1968), circumstances must have been present which gave the police officers an articulable, reasonable suspicion that a crime had just been committed or was about to be committed. In the trial court, Appellant's counsel assumed the presence of such factors and raised no challenge to the lawfulness of the stop, which, in any event, is irrelevant to the issue of the facial invalidity of Section 38.02(a).

Thus, this case does not present the situation of a random, indiscriminate stop by the police escalating into an arrest. Rather, it presents the situation of a lawfully stopped person being required to answer only the most rudimentary kind of investigative inquiry. Without the ability to make such an elementary inquiry and expect an answer, a police officer has little reason to make the stop which already has been sanctioned by Terry v. Ohio, supra, and which has no other purpose than investigation, however cursory.

The second matter suggesting the insubstantiality of the questions on this appeal is the absence of the onerousness typically associated with penalties for violation of a penal law. A violation of Section 38.02(a) is, under Section 38.02(b), a Class C misdemeanor which is punishable solely by a fine not to exceed $200.00. See Section 12.23, Texas Penal Code. Furthermore, since conviction of a Class C misdemeanor imposes no legal disability or disadvantage, see Section 12.03(c), Texas Penal Code, Appellant has suffered no legal disability beyond the imposition of the $45.00 fine.

II.

The Questions are Insubstantial in Light of Prior Decisions by this Court

(a) Appellant argues that Section 38.02(a) is unconstitutional on its face because it punishes silence, thereby violating the first amendment. The only Supreme Court case

cited by Appellant in support of his proposition is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), which concerns itself with the wearing of arm bands as symbolic speech, not with silence as a first amendment right. Appellant has made no attempt to label his silence in the face of the officers' question as "symbolic speech." Similarly, Appellant has not attempted to justify his silence as a refusal to support some state supported religous, political, or moral idea. This case, therefore, is unlike Wooley v. Maynard, __U.S.__, 97 S.Ct. 1428 (1977), where the plaintiff, in effect, refused to support an ideology arguably espoused by the state through a slogan printed on its automobile license plates. Even if the inconceivable were accomplished and Appellant's silence is labeled as a form of expression, the state could offer sufficient justification for its interests in enforcing this statute and the state's criminal laws. Cf. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

(b) Appellant argues that Section 38.02(a) is vague and overbroad, thereby violating the due process clauses of the fifth and fourteenth amendments. The attacked statute is neither vague nor overbroad. The elements necessary for a violation of Section 38.02(a) are clear and as precise as can reasonably be expected of statutory language. There must be a lawful stop, a request for the stopped person's name and address, and a refusal by the stopped person to give his name and address, which refusal must be intentional. This statute, therefore, is sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954).

Appellant's attack on Section 38.02(a) for facial overbreadth is misplaced. Overbreadth analysis is employed in the context of first amendment rights, Broadrick v. Oklahoma, 413 U.S. 601 (1973), and, since no first amendment rights are implicated in this case, an attack in terms of overbreadth must fail. Furthermore, application of the overbreadth doctrine is to be employed only as a last resort, especially in the context of ordinary criminal laws such as the one at issue here. See Broadrick, supra.

(c) Appellant's claim that Section 38.02(a) is, under the fourth amendment, an unconstitutional invasion of the right to privacy lacks merit. The fourth amendment only protects people from governmental intrusions into matters in which they have a "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). A person hardly can be said to have a reasonable expectation of privacy in his name and address, especially when that person has been lawfully stopped by an officer in the first place. A person's name and address are routinely provided to government officers and agencies in a variety of situations -- for property taxes, for automobile registrations, for utility billing, etc. A police officer's asking a lawfully stopped person his name and requiring an answer is one of "the myriad daily situations in which policemen and citizens confront each other on the streets", Terry v. Ohio, 392 U.S. at 12, which does not implicate the fourth amendment.

(d) Appellant's argument that Section 38.02(a) violates the fifth amendment's self-incrimination clause because it punishes silence also lacks merit. First, there is nothing

incriminating about a person's name and address. In this context, a person's name and address are analogous to blood samples in that they are neither testimonial nor communicative in nature. See Schmerber v. California, 384 U.S. 757 (1966). See also United States v. Wade, 388 U.S. 218 (1967) (exhibition of the person at a post-indictment lineup) and Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars). Additionally, Appellant has not indicated how either the implications of the question or its context suggest that a responsive answer or an explanation of why it could not be answered might have been dangerous because injurious disclosure could have resulted. Yet, such is necessary before the privilege can be invoked successfully. Hoffman v. United States, 341 U.S. 479 (1951).

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which the cause depend are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the County Court at Law No. 2 of El Paso County, Texas.

Respectfully submitted,

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